

EXHIBIT 2



December 21, 2018

VIA ELECTRONIC DELIVERY

Department of Health and Human Services
Attn: Michael Marquis, Freedom of Information Officer
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue, S.W.
Washington, DC 20201
FOIARequest@hhs.gov

Re: FOIA Request No. 2019-00191-FOIA

Dear Counsel:

We represent Democracy Forward Foundation (“Democracy Forward”) in FOIA request No. 2019-00191-FOIA (the “FOIA Request”), submitted November 2, 2018. *See* Ex. A. We requested expedited processing in the initial request, which the Department of Health and Human Services (“HHS”) denied on November 19, 2018. *See* Ex. B.¹ We write to renew our request for expedited processing in light of recent factual developments. Alternatively, we request that this letter be treated as an appeal from the denial of our request for expedited processing, and that the denial of expedited processing be reversed.

¹ The initial acknowledgment letter for No. 2019-00191-FOIA-OS stated that the FOIA request was received on November 1, 2018. *See* Ex. C (“Acknowledgment Letter”). That appears to be a reference to an identical FOIA request submitted without attachments, which was superseded by the November 2 submission, as discussed in correspondence between Democracy Forward and HHS. *See* Ex. D. Our understanding is that the tracking number No. 2019-00191-FOIA-OS, and the denial of our request for expedited processing attached hereto as Exhibit B, relate to the FOIA request attached hereto as Exhibit A. If that understanding is incorrect, please identify the FOIA request to which No. 2019-00191-FOIA-OS relates, and advise us of the status of the request attached as Exhibit A.

Background

I. Events Prior to the FOIA Request

The FOIA Request concerns HHS's use of funds appropriated by Congress for the Teen Pregnancy Prevention Program ("TPP") in the Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 733 ("2018 CAA"). The relevant portion of the TPP appropriation, known as "Tier 1," requires HHS to spend the funds on "competitive contracts and grants" that "fund medically accurate and age appropriate programs that reduce teen pregnancy" by "replicating programs that have been proven effective through rigorous evaluation." *Id.* The 2018 appropriation was set to expire at the end of the fiscal year on September 30, 2018.

Earlier in 2018, Democracy Forward filed three lawsuits on behalf of recipients of Teen Pregnancy Prevention Program ("TPP") grants. The first two cases challenged HHS's decision to cancel all existing TPP grants.² Courts granted summary judgment in favor of Democracy Forward's clients and three other groups of plaintiffs, and HHS declined to appeal the rulings.³ The third case challenged HHS's attempt to award Tier 1 through a new Funding Opportunity Announcement (the "2018 Tier 1 FOA") issued the day after courts began vacating the terminations.⁴ That FOA, among other problems, did not require the funded programs have been proven effective through rigorous evaluation, thus violating the statutory restrictions in the 2018 CAA; the Purpose Statute, 31 U.S.C. § 1301; and the Appropriations Clause. The court again granted summary judgment, vacating HHS's effort to award the funds at issue on August 30, 2018, as did a similar case brought by another plaintiff.⁵ HHS's appeal is currently pending.

During the briefing in *Multnomah County*, HHS represented that the 2018 Tier 1 FOA was the only way that it could award the remaining Tier 1 funds, claiming that the funds "must be spent by September 30 or they revert to the Treasury, and there is no time to spend them except through this FOA." *Multnomah Cnty.*, Defs.' Mot. to Dismiss or for Summ. J. at 2 (July 13, 2018), Dkt. No. 42. On September 26, 2018, HHS's Office of Adolescent Health ("OAH") issued a press release listing 41 "intended" grantees to which it "would have" awarded approximately \$20 million in grants but for the court orders in *Multnomah County* and *PPNYC* enjoining the awards. Ex. E (the "Press Release").

² See *Healthy Teen Network v. Azar*, 322 F. Supp. 3d 647 (D. Md. 2018); *King Cnty. v. Azar*, 320 F. Supp. 3d 1167 (W.D. Wash. 2018).

³ See *id.*; see also *Healthy Futures of Tex. v. HHS*, 315 F. Supp. 3d 339 (D.D.C. 2018); *Policy & Research LLC v. HHS*, 313 F. Supp. 3d 62 (D.D.C. 2018); *Planned Parenthood of Greater Wash. & N. Idaho*, 328 F. Supp. 3d 1133 (E.D. Wash. 2018).

⁴ See *Multnomah Cnty. v. Azar*, No. 18-cv-1015, 2018 WL 4169023 (D. Or. June 22, 2018).

⁵ *Id.*; see also *Planned Parenthood of N.Y.C.*, No. 18-cv-5680, 2018 WL 4168977 (S.D.N.Y. Aug. 30, 2018) ("*PPNYC*").

Nevertheless, on the last business day of the fiscal year, HHS obligated approximately \$21 million to a “supplemental agreement for work within scope” (the “Supplemental Agreement”) with the MITRE Corporation (“MITRE”) for work pertaining to the TPP Program.⁶

II. The FOIA Request

Democracy Forward submitted the FOIA Request on November 2, 2018 to determine whether the MITRE award and any subawards to be made thereunder were lawful under the 2018 CAA and the court’s orders in *Multnomah County* and *PPNY*. See Ex. A. The FOIA Request sought a copy of the Supplemental Agreement with MITRE and any proposals, solicitations, orders, or subawards associated with that Agreement; the original award to which the Supplemental Agreement related; all communications between HHS and the MITRE corporation about the Supplemental Agreement; all communications regarding the Press Release and/or the disposition of the remaining Tier 1 funding; and all communications between HHS and the “intended” grantees listed in the Press Release. *Id.* at 2-3. Democracy Forward requested expedited processing for the FOIA Request, in light of the “urgent need to inform the public about this issue” given “HHS’s persistent lack of transparency,” “questions concerning the agency’s lawful use of appropriate funds,” and the “significant media interest” surrounding HHS’s disposition of TPP funds. *Id.* at 5.

HHS acknowledged receiving the FOIA Request on November 8, 2018. See Ex. C. On November 19, 2018, it rejected Democracy Forward’s request for expedited processing, finding, with no reasoning whatsoever, that Democracy Forward had not “clearly demonstrated a ‘compelling need’”; had not “clearly articulated an imminent threat to the life or physical safety of an individual”; and had not “demonstrated that there is an ‘urgency to inform the public concerning actual or alleged Federal activity’ through a request by one primarily engaged in disseminating information to the public.” Ex. B.

III. Events Since the FOIA Request

On November 7, 2018, Democracy Forward sent a letter to the Department of Justice (“DOJ”) attorney who is counsel for HHS in its appeal from the *Multnomah County* decision. See Ex. F. The letter explained Democracy Forward’s (and Multnomah County’s) concern that the MITRE award was, like HHS’s prior two TPP actions, unlawful. On November 21, DOJ confirmed that the funds awarded to MITRE were the Tier 1 funds at the center of the *Multnomah County* litigation and discussed in the September 26 press release. See Ex. G.

⁶ See Contract Summary, Award from HHS to MITRE Corporation, Award ID HHSP233201700025U, USASPENDING.gov, <https://www.USASPENDING.gov/#/award/23605015> (see “Transaction History” tab, Modification Number 3) (last visited Dec. 21, 2018).

Additionally, on November 15, 2018, MITRE and/or HHS issued a sub-award to Be Strong International, Inc. (“Be Strong”), one of the organizations listed in the September 26 press release as an “intended” grantee.⁷

These facts give rise to a strong inference that HHS has violated and is continuing to violate the 2018 CAA and/or the *Multnomah County* and *PPNY* orders. DOJ has admitted that the MITRE Supplemental Agreement obligated the remaining Tier 1 funds, notwithstanding HHS’s representation that the money could not be obligated prior to September 30 except through the vacated 2018 Tier 1 FOA. There is no evidence of any competitive process producing that Supplemental Agreement or any opportunity for Multnomah County or other potential grantees to apply for the funds, and money has been disbursed to at least one grantee on the “intended” list in the Press Release.

Accordingly, Democracy Forward wrote to DOJ again on December 6, 2018, with further questions, including (among other things) a request for a copy of the Supplemental Agreement and whether MITRE had already begun making subcontract awards or otherwise disposing of the money, and, if not, the earliest date when it may begin doing so. *See* Ex. H. On December 12, 2018, DOJ declined to answer most of these questions because they purportedly “do not concern the district court order vacating the 2018 Tier 1 TPP FOA in the *Multnomah County* case, and therefore [are] better addressed to the relevant components of HHS for a response in the first instance.” Ex. I.

IV. Renewed Request for Expedited Processing

FOIA obligates agencies to “promulgate regulations ... providing for expeditious processing of requests for records (I) in cases in which the person requesting the records demonstrates a compelling need; and (II) in other cases determined by the agency.” 5 U.S.C. § 552(a)(6)(E)(i). As explained in the Acknowledgment Letter, HHS considers requests for expedited processing in several circumstances, including “an imminent threat to the life and safety of an individual; an urgency to inform the public concerning government activity (provided you are a member of the media); a deadline in litigation; a deadline or commenting on proposed regulations; or other urgent matters.” Ex. C.

As far as the November 19 denial of Democracy Forward’s request for expedited processing reveals, HHS only considered the first two of these grounds (erroneously finding that there was no “urgency to inform the public concerning government activity”), and not whether the case fits into any of the other grounds that HHS considers under the category of “other cases determined by the agency.” Both on the original facts—and, more plainly, on the factual record that has developed since the denial—the Request fulfills two of the circumstances set forth by the agency: it concerns “matters about which there is an urgency to inform the public concerning government activity,” as well as urgent matters akin to litigation and comment deadlines, such

⁷ Contract Summary, Award from HHS to MITRE Corporation, Award ID HHSP233201700025U, USASPENDING.gov, <https://www.USASPENDING.gov/#/award/23605015> (see “Sub-Awards” tab, Sub-Award ID 125900) (last visited Dec. 21, 2018).

that private rights and important public health programs may all be irreparably altered, and taxpayer funds irreversibly misused, if the Request is not expeditiously processed.

The TPP Program is a “creature of Congress,” *Healthy Teen Network*, 322 F. Supp. 3d at 650, and comes with “specific mandates” restricting how HHS may use the funds that Congress has appropriated, *Multnomah Cnty.*, 2018 WL 4169023, at *11; *see also, e.g., PPNYC*, 2018 WL 4168977, at *10. Among these restrictions is that contracts and grants must be “competitive,” and that Tier 1 funds may only go to “replicating programs that have been proven effective through rigorous evaluation to reduce teenage pregnancy, behavioral risk factors underlying teenage pregnancy, or other associated risk factors.” 132 Stat. at 733. When HHS awards contracts and grants without providing fair competitive opportunities, it injures entities who would compete for funding in a fair and open competition—not to mention the many young persons who would benefit from the programs that they would fund. Indeed, such injury is irreparable: once the money has been disbursed to grantees, or spent by contractors who unlawfully receive it, it typically cannot be recovered and entities like Multnomah County are left without any recourse. *See PPNYC*, 2018 WL 4168977, at *24; *see generally City of Houston v. HUD*, 24 F.3d 1421, 1426 (D.C. Cir. 1994) (once funds have been obligated to grantees, courts typically “cannot reach them in order to award relief”).

Here, all publicly available evidence strongly suggests that HHS has unlawfully obligated \$21 million in contravention of Congressional requirements and to the detriment of entities such as Multnomah County. HHS has twice tried to unlawfully divert funds from the TPP Program as Congress created it. Now it has disposed of \$21 million in Tier 1 funds without any public explanation, despite previously claiming that the *only* way that this money could be awarded is through the 2018 Tier 1 FOA—the FOA that has now been vacated by multiple courts. No competition was held to determine who would receive the \$21 million in Tier 1 funds; HHS simply awarded it to MITRE without an opportunity for any other entities to compete. And HHS, through its counsel, has explained that only the agency—and specifically the relevant agency components to which Democracy Forward directed the FOIA Request—can answer crucial questions about this conduct and refute the strong implication of unlawful conduct.

Accordingly, there is unquestionably an urgent need to inform the public concerning the government activity at issue here, satisfying the substantive prong of 5 U.S.C. § 552(a)(6)(E)(I). Moreover, Democracy Forward is a “member of the media.” Ex. C. Democracy Forward’s primary mission is to “help expose ... corruption in the Executive Branch,” carried out with “a commitment to educating the public [and] bring[ing] together a team of experienced litigators, analysts, and communicators to ensure that when the government acts unlawfully, the public know about it.”⁸ Documents that Democracy Forward has obtained via FOIA and, when necessary, fought for in court have been the subject of numerous news stories of significant public interest.⁹ In particular, Democracy Forward used a previous FOIA request about HHS’s

⁸ Democracy Forward, *Who We Are*, <https://democracyforward.org/about/> (last visited Dec. 21, 2018).

⁹ *See, e.g., Vera Bergengruen, New Emails Show What Happens When the Pentagon Has To Scramble To Catch Up To Trump*, BuzzFeed News (July 25, 2018),

early efforts to “abolish” the TPP Program to bring the issue to the public’s attention,¹⁰ beginning a nationwide conversation about the TPP Program that has included countless news articles and numerous inquiries from elected officials—including about the publicly unexplained actions at issue here.¹¹

Similarly, the FOIA Request concerns an “urgent matter,” Ex. C, satisfying 5 U.S.C. § 552(a)(6)(E)(II). As already explained, the strong possibility that HHS is again misusing the taxpayer funds appropriated for the TPP Program—as it has done twice before—requires prompt disclosure and public understanding. Several factors combine to make this an exceptional case: HHS’s repeated violations of the law in this area, as found by six separate courts; irreparable injury to municipalities and public health organizations across the country; widespread public concern among the public, the media, and elected officials; and, perhaps most unusually, DOJ’s

<https://www.buzzfeednews.com/article/verabergengruen/these-emails-show-what-happens-when-the-white-house-keeps>; Erin Dooley, *Exclusive: Former For-Profit College Executive Shaped Education Department Policy That Could Benefit Former Employers: Documents*, ABC News (May 15, 2018), <https://abcnews.go.com/US/exclusive-profit-college-executive-shaped-education-department-policy/story?id=55108981>; Celeste Katz, *Interior Department Tapped Wildlife Preparedness Funds for Ryan Zinke Helicopter Tour*, Newsweek (Dec. 29, 2017), <https://www.newsweek.com/ryan-zinke-interior-department-helicopters-wildfires-757857>.

¹⁰ See, e.g., Heidi Pryzbyla, *Notes, Emails Reveal Trump Appointees’ War to End HHS tTeen Pregnancy Program*, NBC News (Mar. 20, 2018), <https://www.nbcnews.com/politics/politics-news/notes-emails-reveal-trump-appointees-war-end-hhs-teen-pregnancy-n857686>; Jessie Hellman, *Political Appointees Led Cancellation of Teen Pregnancy Prevention Program*, The Hill (Mar. 20, 2018), <https://thehill.com/policy/healthcare/379358-political-appointees-led-cancellation-of-teen-pregnancy-prevention-program>; Sabrina Eaton, *Ex-head of Ohio Abstinence Program Helped End Federal Sex-ed Grants, Documents Show*, Cleveland Plain Dealer (Mar. 21, 2018), https://www.cleveland.com/metro/index.ssf/2018/03/did_ex-head_of_ohios_abstinenc.html; Shane Ryan, *Abstinence Activists, Appointed by Trump, Killed an HHS Teen Pregnancy Prevention Program*, Paste Magazine (Mar. 27, 2018), <https://www.pastemagazine.com/articles/2018/03/abstinence-activists-appointed-by-trump-killed-an.html>.

¹¹ See, e.g., Letter from Patty Murray et al. to HHS Secretary Alex M. Azar II (Dec. 19, 2018) (questioning source of funding for MITRE contract), available at http://media1.s-nbcnews.com/i/today/z_creative/20181219%20TPPP%20Letter.pdf; Heidi Przybyla, *Trump Administration Defies Court Order by Pushing Abstinence, Democrats Say*, NBC News (Dec. 20, 2018), <https://www.nbcnews.com/politics/politics-news/trump-administration-defies-court-order-pushing-abstinence-democrats-say-n950146>; Jessie Hellmann, *Fourth Federal Judge Blocks Trump’s Cuts to Teen Pregnancy Prevention*, The Hill (May 29, 2018), <https://thehill.com/policy/healthcare/389738-fourth-federal-judge-rules-against-trumps-cuts-to-teen-pregnancy-prevention>; Nate Raymond, Editorial, *A Successful Teen Pregnancy Program in Dallas is About to be Slashed. Why? Politics*, Dallas Morning News (Mar. 23, 2018), <https://www.dallasnews.com/opinion/editorials/2018/03/23/successful-teen-pregnancy-program-dallas-killed-politics>.

explicit instructions that answers must be sought from the “relevant components,” Ex. I, which are the components to whom the FOIA Request was directed.

Accordingly, expeditious production of documents is urgently needed to protect the rights of dozens of local governments and non-profits, to say nothing of over a million vulnerable young persons served by Tier 1 programs. For all of these reasons, Democracy Forward respectfully urges that HHS grant its renewed request for expedited processing, or reverse its denial of Democracy Forward’s initial request for expedited processing. If you wish to discuss any aspects of this renewed request or the underlying FOIA Request, we would be happy to do so at your convenience. We look forward to your expeditious response.

Respectfully,

/s/ Josephine Morse

Josephine Morse
Senior Counsel, Democracy Forward Foundation

/s/ Jeffrey Dubner

Jeffrey Dubner
Senior Counsel, Democracy Forward Foundation

Counsel for Democracy Forward Foundation

I hereby certify that the information contained in Section IV, in support of our request for expedited processing is true and correct pursuant to 45 C.F.R. § 5.27(a).

/s/ Josephine Morse

Josephine Morse

CC:

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